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No. 92-1741

In the Supreme Court of the United States

OCTOBER TERM, 1993

ALPINE LAND AND RESERVOIR COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

Supreme Court, U.S.
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to relief under Fed. R. Civ. P. 60(b)(6) that would modify a final water-rights decree to increase the amount of water petitioner was permitted to store in its reservoirs.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-12A) is reported at 984 F.2d 1047. The opinion of the district court (Pet. App. 1B-19B) is reported at 769 F. Supp. 1142.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1993. A petition for rehearing was denied on March 15, 1993. The petition for a writ of certiorari was filed on April 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner moved under Fed. R. Civ. P. 60(b) to modify a final water-rights decree in order to increase the amount of water it was permitted to store in its reservoirs. Pet. App. 1B. Prior to entry of the decree, however, the United States had specifically objected to the increased storage rights sought by petitioner, and the district court had sustained the United States' objection. Petitioner did not seek reconsideration of that ruling or challenge it on appeal. Pet. App. 5A-6A. Nonetheless, the district court below granted post-judgment relief to petitioner under Fed. R. Civ. P. 60(b)(6), holding that petitioner could not reasonably have been expected to read the court papers in which the United States raised its objection. Pet. App. 16B-18B. The court of appeals reversed, holding that petitioner's failure to read the court papers was not an exceptional circumstance warranting relief under Rule 60(b)(6).

1. In 1925, the United States brought a quiet title action to adjudicate rights to the waters of the Carson River, which runs eastward from the Sierra Nevada mountain range in California to the Lahontan Reservoir in central Nevada, where it joins with water from the Truckee River Diversion Canal. See *United States* v. *Alpine Land & Reservoir Co.*, 697 F.2d 851, 852-853 (9th Cir.), cert. denied, 464 U.S. 863 (1983); Gov't C.A. Br. 4. Petitioner, which owns four reservoirs on the upstream reaches of the Carson River, was one of the parties to the quiet title action. In the late 1940s and early 1950s, petitioner obtained certificates from California authorizing it to expand (approximately to double) the storage capacities of its reservoirs. Pet. App. 1B-3B. In 1958, the Special Master assigned to the case issued a report entitled "Amended Proposed Findings of Fact, Conclusions of Law and Decree" that recognized the increased capac-

ities of petitioner's reservoirs and proposed that petitioner be permitted to divert and store water at the increased levels. The Special Master did not, however, supplement the record to include the state certificates evidencing the increased storage capacities of petitioner's reservoirs. The case then remained in abeyance until 1973, when it was reactivated at the government's request. *Id.* at 3B-4B.

In 1973, the United States filed objections to the Special Master's proposed findings and decree. Of relevance here, the United States specifically objected to petitioner's claims for storage rights, contending that the proposed findings regarding the increased storage capacities of petitioner's reservoirs were not supported by any evidence in the record. Pet. App. 4B. Petitioner did not respond to the government's objections. C.A. Exc. Rec. 41-42. Accordingly, the district court sustained the objections in its "Rulings on Specific Objections to the Special Master's Findings on Acreages and Priorities," issued in December 1980. *Id.* at 5-6, ¶¶ 42, 44-46 (ruling on Claims 800, 802, 803, and 804). The court's final decree, also entered in 1980, authorized petitioner to divert and store water only at the pre-expansion capacities of its reservoirs. Pet. App. 6A. Petitioner did not seek reconsideration of that aspect of the final decree or challenge it on appeal. *Ibid.*

2. In 1991, petitioner moved under Fed. R. Civ. P. 60(b) to reopen and modify the final decree to increase the amount of water it was permitted to store in its reservoirs. Petitioner claimed that it did not discover that the final decree limited its storage rights to pre-expansion levels until 1983, at which point it petitioned the Special Master for administrative amendments to the decree. C.A. Exc. Rec. 46-48. Although the Special Master never ruled on those petitions, petitioner took no further action until 1991, when the new Special Master advised it

that he might have to limit its use of water to comply with the final decree. *Id.* at 48.

The district court granted petitioner's motion, holding that relief was warranted under Fed. R. Civ. P. 60(b)(6). Pet. App. 1B-19B.[1] The court recognized that a party seeking relief under Rule 60(b)(6) must show, *inter alia*, that it was without fault in failing to seek relief prior to the entry of judgment. Pet. App. 15B-16B. The court also recognized that the absence-of-fault requirement pointed up "the weakest link" in petitioner's case, given its failure to respond to the government's objections or to challenge the court's rulings sustaining those objections. Nonetheless, the court determined that, in order to discover the government's objections, "[a] careful review by an employee or agent of [petitioner] of every objection filed would have been required." Pet. App. 17B. In the court's view, that level of scrutiny exceeded what was required under a standard of "ordinary care." *Id.* at 17B-18B.

3. The court of appeals reversed and remanded the case "for entry of an order denying Rule 60(b)(6) relief." Pet. App. 12A. The court observed that "Rule 60(b)(6) relief normally will not be granted unless the moving party is able to show both injury and that circumstances beyond its control prevented timely action to protect its interests." *Id.* at 11A. The court found no such circumstances here to justify petitioner's failure to seek timely relief from the provisions in the 1980 decree that restricted petitioner's storage rights to pre-expansion levels:

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[1] The court initially held that the five grounds for relief set out in Fed. R. Civ. P. 60(b)(1)-(b)(5) were inapplicable. Pet. App. 9B-10B. Petitioner did not challenge that holding in the court of appeals and does not challenge it in this Court. Pet. 24 n.5. Rule 60(b)(6) is a residual provision, authorizing relief for "any other reason justifying relief from the operation of the judgment."

> The record before the district court does not reflect any irregularities in the notice provided to [petitioner] of the government's 1973 objections. Nor is there any contention that the district court's 1980 decision upholding the government's objection to [petitioner's] storage entitlement was not properly served on [petitioner]. The record does not reveal any reason for [petitioner's] failure to respond to the 1973 objections.

Id. at 7A-8A. The court of appeals rejected the district court's reliance on its "apparent[] belie[f] that requiring an employee of [petitioner] to read the entire lengthy set of objections and decree so as to know the decree's adverse impact was a burden great enough to render [petitioner's] delay reasonable." *Id.* at 8A. First, the court of appeals determined, the large volume of court papers "[a]t most" supported a claim of "excusable neglect" under Rule 60(b)(1), but "Rule 6[0](b)(6) is not a substitute for 60(b)(1)." *Id.* at 12A. In any event, the court of appeals found "no reason for holding litigants in complex water rights litigation to any lesser standard than litigants in other proceedings"; on the contrary, "[p]articipants in water adjudications are entitled to rely on the finality of decrees as much as, if not more than, parties to other types of civil judgments." *Ibid.* (citing *Nevada* v. *United States*, 463 U.S. 110, 128-130 (1983)).

ARGUMENT

1. Petitioner contends (Pet. 17-29) that the court of appeals erred in holding that it was not entitled to relief under Fed. R. Civ. P. 60(b)(6). The court of appeals' holding is correct, however, and petitioner's fact-bound contention to the contrary does not warrant further review.

This Court has made clear that relief under Rule 60(b)(6) is available only when relief under subdivisions (1) to (5) of Rule 60(b) is not available and "exceptional

circumstances" exist. *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 863-864 & n.11 (1988); see also *Klapprott* v. *United States*, 335 U.S. 601, 613-615 (1949); *Ackermann* v. *United States*, 340 U.S. 193, 199 (1950). "Of particular importance" in determining the existence of exceptional circumstances, the Court has said, is whether the case "involv[es] neglect or lack of due diligence" by the moving party. *Liljeberg*, 486 U.S. at 863 n.11.

Here, the court of appeals correctly concluded that petitioner was guilty of neglect and lack of due diligence in failing to seek relief prior to entry of the final water-rights decree. As the court observed, petitioner did not contend that there were "any irregularities" in the notice provided to it of the government's 1973 objections to its claims for storage rights. Pet. App. 7A. In those objections, the government specifically challenged petitioner's claims on the ground that the record did not support the increased storage capacities recited in the Special Master's proposed findings. *Id.* at 5A-6A. Thus, if petitioner had read the government's objections, it would have had clear notice that the record did not contain the California certificates evidencing the increased storage capacities of its reservoirs, and it could have remedied that problem before the decree became final.

The district court recognized that, if petitioner had conducted "[a] careful review" of the government's objections, it would have discovered that the certificates were not in the record. Pet. App. 17B. Nonetheless, the district court did not believe that such a review was required in the exercise of ordinary care. *Id.* at 17B-18B. The court of appeals properly rejected that view, stating that "there is no reason for holding litigants in complex water rights litigation to any lesser standard than litigants in other proceedings." *Id.* at 12A. The court of

appeals correctly recognized (*ibid.*) that the district court's view conflicted with traditional policies of finality, which are "perhaps * * * at their zenith in cases concerning real property, land and water." *Nevada* v. *United States*, 463 U.S. 110, 129 n.10 (1983).[2]

In any event, petitioner's lack of due diligence did not end with its failure to respond to the government's objections; in addition, petitioner unreasonably failed to seek reconsideration of the court's rulings on the government's objections or to challenge those rulings on appeal. Even the district court below did not suggest that it was reasonable for petitioner to neglect to read

[2] Finality concerns have special force with respect to the final decree in this case. The Carson River flows and Truckee River flows, both of which supply the Newlands Reclamation Project, have been the subject of numerous lawsuits, regulatory actions, and a congressional settlement Act. See Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. No. 101-618, Tit. II, 104 Stat. 3294-3324 (1990); 43 C.F.R. Pt. 418; *United States* v. *Alpine Land & Reservoir Co.*, 887 F.2d 207, 210 n.2 (9th Cir. 1989), cert. denied, 498 U.S. 817 (1990); *Pyramid Lake Paiute Tribe of Indians* v. *Hodel*, 882 F.2d 364, 366-367 (9th Cir. 1989); *Pyramid Lake Paiute Tribe of Indians* v. *Morton*, 354 F. Supp. 252 (D.D.C. 1972). In 1988, the Secretary of the Interior developed Final Operating Criteria and Procedures (OCAP) for the Newlands Project, which provides that the Project will be supplied by Carson waters in accordance with the 1980 decree at issue here and to the maximum extent such waters are available, in order to minimize the use of waters from the Truckee River, the other available source. Gov't C.A. Br. 16. The 1988 OCAP recognizes that if shortages of Carson waters supplying the Newlands Project are compensated by diversions of additional waters from the Truckee, downstream water needs on both the Carson and the Truckee could be affected. Those needs include the maintenance of endangered and threatened fish species at Pyramid Lake, which is the terminus of the Truckee River and encompassed by the reservation of the Pyramid Lake Paiute Tribe of Indians. See *Nevada* v. *United States*, 463 U.S. at 115-116; *United States* v. *Alpine Land & Reservoir Co.*, 887 F.2d at 208.

the court's rulings.[3] Those rulings plainly stated that there was no evidence to support the increased storage rights sought by petitioners, and they expressly limited petitioner's storage rights to pre-expansion levels.[4] Thus, the district court's rulings gave petitioner further notice that the record did not contain the California certificates and that it should remedy that deficiency before the 1980 decree became final. Petitioner has offered no excuse for its failure to do so; it merely states that "it did not know about the modifications * * * contained within [the final] decree." Pet. 13. The court of appeals properly refused to relieve petitioner of the consequences of its failure to protect its rights in a timely manner.[5]

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[3] Contrary to petitioner's assertion (Pet. 13), the district court did not find that petitioner was "without fault" in failing to challenge the final decree. The district court's finding as to the absence of fault related solely to petitioner's failure to respond to the government's objections. Pet. App. 17B-18B. Moreover, as discussed in the text, that finding was based on the mistaken view that petitioner was not required in the exercise of ordinary care to read the government's objections.

[4] For example, the district court ruled with respect to petitioner's claim No. 802, regarding Lower Kinney Lake:

> The government's objection to the increased capacity in the amended finding is sustained. The capacity shall be 495 acre-feet. Neither Ex. 273 nor any other evidence supports the amended finding.

C.A. Exc. Rec. 5 (¶ 44); see also *id.* at 5-6 (¶¶ 42, 45, and 46, sustaining government's objections to Claim Nos. 800, 803, and 804). The final decree likewise set the capacity for Lower Kinney Lake at 495 acre-feet, the pre-expansion capacity. *Id.* at 15.

[5] As the court of appeals observed, petitioner's failure to protect its rights by responding to the government's objections or challenging the final decree, considered most favorably to petitioner, might have supported relief under Rule 60(b)(1) for "excusable neglect." Pet. App. 12A. Motions under Rule 60(b)(1),

Although petitioner criticizes the court of appeals for ignoring "a litany of exceptional circumstances" (Pet. 20), none of the circumstances cited by petitioner justified relief under Rule 60(b)(6). Petitioner first asserts that the relief it requested "does not greatly affect anyone." Pet. 17. The district court correctly rejected that assertion, noting that "[a]ny increase of decreed rights upstream from Lahontan reservoir will adversely impact the water entitlement of the United States in and below Lahontan reservoir." Pet. App. 8B-9B. Petitioner next asserts that it stored water at post-expansion levels "with the government's knowledge, agreement and acquiescence." Pet. 19. There is no evidence in the record, however, that the government was aware of the amount of water petitioner was using. Finally, petitioner contends (Pet. 19) and the district court determined (Pet. App. 16B) that the Special Master's failure to include the California certificates in the record was an error "extrinsic to the record." The government's objections to petitioner's claims and the court's rulings on those objections *were* part of the record, however, and, as discussed earlier, they made it plain that the certificates had not been included in the record.

In sum, this is not a case in which a party was prevented from seeking timely relief by extraordinary circumstances beyond its control. For that reason, the court of appeals properly held that relief under Rule 60(b)(6) was unwarranted.

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however, must be made within one year of entry of the judgment; petitioner filed its motion 11 years after entry of the judgment and therefore was not entitled to relief under that provision. Petitioner cannot obtain relief for excusable neglect under Rule 60(b)(6), because relief under that provision cannot be "premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." *Liljeberg*, 486 U.S. at 863.

2. Petitioner further claims (Pet. i, 10-11, 21) that its use of water was authorized by the government's alleged "agreement" to abide by historical practices and customs of water distribution. Neither the court of appeals nor the district court adverted to this claim, and it does not appear that petitioner raised it below. In any event, the claim lacks merit.

Petitioner traces the alleged agreement to the district court's statement in a prior opinion that "the United States has agreed with all other parties that this Court should recognize the historical customs, practices and agreements by which water has been distributed in the upper river areas." *United States* v. *Alpine Land & Reservoir Co.*, 503 F. Supp. 877, 889-891 (D. Nev. 1980), aff'd as modified, 697 F.2d 851 (9th Cir.), cert. denied, 464 U.S. 863 (1983). The court thereafter observed, however, that the United States sought "a reasonable quantification of the upstream rights so as to clarify the protection of its downstream rights." 503 F. Supp. at 890.

The 1980 decree provided the quantification sought by the United States. In doing so, the decree took into account, *inter alia*, existing upstream uses. As discussed above in Point 1, petitioner had ample opportunity to challenge the decree's quantification of its rights before the decree became final. Petitioner cannot now, 13 years later, rely on an alleged practice of using greater amounts of water than permitted under the decree as a basis for reopening and modifying the decree.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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